

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT D. ROSE)	
Claimant)	
VS.)	
)	Docket No. 239,013
ADVANTAGE HEATING & A.C., INC.)	
Respondent)	
AND)	
)	
CINCINNATI INSURANCE)	
Insurance Carrier)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated January 7, 1999, wherein the Administrative Law Judge granted claimant benefits in the form of temporary total disability compensation and medical treatment with Dr. Greg Horton as the authorized treating physician.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent to his foot and his back?
- (2) Did claimant provide timely notice as required by K.S.A. 44-520?
- (3) Did claimant suffer an intervening repetitive trauma to the foot after leaving respondent, which would relieve respondent of the obligation of providing benefits for claimant's foot and back?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds the Order of Administrative Law Judge Brad E. Avery should be reversed as claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent to his foot or his back, and has further failed to prove timely notice of said injury during his employment with respondent.

Claimant suffered an accidental injury on December 1, 1997, when he fell from a ladder, striking his body under his right shoulder and allegedly striking his left foot. Claimant was referred for treatment to Mt. Oread Medical Arts Centre, Lawrence Occupational Health Services, with Dr. Michael Geist. Dr. Geist first saw claimant on the date of accident. At that time, he assessed claimant as suffering a right shoulder contusion/strain, and ordered x-rays to his shoulder, which he diagnosed as being normal. He did advise claimant to ice the area, and provided claimant a sling to wear for a couple of days. Dr. Geist returned claimant to work light duty, and ordered him back for a recheck. Claimant returned to Dr. Geist's office on December 3, 1997, at which time Dr. Ralph Schutz saw claimant and noted a resolving shoulder strain. Claimant was next examined by Dr. Geist on December 8, 1997, at which time the shoulder was examined and diagnosed as improving. Claimant continued on light duty and was provided pain medication. On December 15, 1997, Dr. Geist examined claimant for the last time, diagnosing resolving shoulder strain. At that time, he released claimant to return to work and prescribed home exercises. He also recommended that, if claimant had further problems, he should return to Dr. Geist for further examination and treatment.

The medical records of Mt. Oread Medical Arts Centre, and in particular of Dr. Geist and Dr. Schutz, made no mention of any injury to claimant's foot or any claim of an injury to claimant's foot. At no time was claimant provided treatment for this alleged foot injury through Mt. Oread Medical Arts Centre. Claimant continued working for respondent through June 5, 1998. At that time, claimant and respondent entered into a discussion regarding claimant's pay rate and the pay rates being offered by other employers. As respondent was unwilling to match the higher pay scale of another employer, claimant opted to terminate his employment with respondent and go to work for KB Complete.

In August 1998, claimant went to the University of Kansas Medical Center in order to obtain treatment for the foot. Claimant was referred to Dr. Horton, whom he first saw in September 1998. Dr. Horton diagnosed claimant as having a possible herniated nucleus pulposus, with symptoms radiating down the left leg, and with a left plantar fasciitis.

Claimant alleges that, as a result of being placed in a cast by Dr. Horton in October 1998, he developed a limp. This limp then aggravated claimant's low back condition. Claimant acknowledged he had injured his low back in 1988 in an earlier work-related accident.

Claimant further alleges he told Randall Ortiz, president of respondent, of both the foot and shoulder injuries. Mr. Ortiz, who testified at the preliminary hearing, denied being

advised of any foot or back complaints by claimant at any time. Mr. Ortiz did acknowledge he was advised of the shoulder injury, and provided and paid for the medical treatment through Mt. Oread Medical Arts Centre. This satisfies the requirements of K.S.A. 44-520, which requires notice of an “accident.” Claimant continued working for respondent through June 5, 1998, at which time the discussion regarding the pay scale occurred, and claimant opted to terminate his employment. At no time prior to his last date of employment did claimant ever advise Mr. Ortiz of any foot or back problems.

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

In this situation, claimant alleges accidental injury to both his shoulder and his foot in December 1997. However, the medical reports, contemporaneous with claimant's injury, and the three subsequent examinations failed to show any indication that claimant advised either Dr. Geist or Dr. Schutz of a foot injury stemming from the December 1997 accident. The first mention in the medical records of an injury to claimant's foot occurred in September 1998, after claimant had worked for a different employer for three months.

Claimant acknowledges that, after he went to work for KB Complete in the summer of 1998, his foot problem worsened to the point where, in September 1998, he required additional medical treatment. Claimant did allege that his foot problem first began to worsen in April 1998, when he soaked the foot, but Mr. Ortiz denies any knowledge of this alleged foot involvement. In addition, claimant failed to seek any medical treatment for the foot while employed with respondent through June 5, 1998.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The medical evidence, contemporaneous with claimant's alleged injury, is void of any mention of the foot. The foot is not mentioned in the medical evidence until nine months after claimant's accidental injury on December 1, 1997. In addition, claimant's condition substantially worsened while working for a different employer. This persuades the Appeals Board that claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent for injuries suffered to claimant's foot. The medical evidence and claimant's testimony verify that the back did not become symptomatic until three weeks after claimant was placed in a foot cast in October 1998.

This would eliminate any involvement between claimant's back and the December 1997 accidental injury to his shoulder.

Claimant has failed to prove that he suffered an accidental injury arising out of and in the course of his employment with respondent to his foot or back from the December 1997 accident. The Appeals Board finds the benefits for the foot and back should be denied, and the Order of Administrative Law Judge Brad E. Avery dated January 7, 1999, should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated January 7, 1999, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

c: Robert W. Harris, Kansas City, KS
Anton C. Andersen, Kansas City, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director